IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES AND DERIVATIVE & "ERISA" LITIGATION	§	**MDL 1446**
This Document Relates to:	§	
	§	
MARK NEWBY, *et al.*,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3624**
	§	**AND CONSOLIDATED CASES**
v.	§	
	§	
ENRON CORPORATION, *et al.*,	§	
	§	
Defendants.	§	

RESPONDENTS' OPPOSITION TO FLEMING & ASSOCIATES, L.L.P.'S MOTION FOR LEAVE TO FILE ENRON-RELATED ACTIONS IN STATE COURT AND MOTION TO MODIFY ORDER

TO THE HONORABLE JUDGE HARMON:

Respondents[1] file this Opposition to Fleming & Associates, L.L.P.'s Motion for Leave to File Enron-Related Actions in State Court and Motion to Modify Order ("Motion"), and respectfully show as follows:

I. Introduction

On February 15, 2002, the Court entered an Order enjoining Fleming & Associates, L.L.P. ("Fleming") from filing any additional Enron-related actions without leave of court. *See* Docket No. 296 ("Order"). The Court entered this Order for good reason. By filing state court lawsuits, Fleming had engaged in continuous vexatious litigation tactics employed to disrupt the orderly proceedings in this Court. Although Fleming now seeks to have the Court modify its

[1] Respondents include Kenneth L. Lay, Rebecca Mark-Jusbasche, John A. Urquhart, Richard B. Buy, Richard A. Causey, Mark A. Frevert, Kevin P. Hannon, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, Lou L. Pai, Jeffrey K. Skilling, Andrew Fastow, Ken L. Harrison, and Stanley C. Horton.

1801

Order to allow Fleming to file state court lawsuits without leave, it has provided no legitimate reason why this Court should do so. This Court should not abandon its restraint which was judiciously designed to address and control Fleming's errant tactics.

II. Arguments and Authority

As a general rule, a court should not modify an injunction except when it is necessary to achieve the original purposes of the injunction which have not been fully achieved. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 579 (5th Cir. 1996). The Order in its current form continues to achieve its original purpose – to rein in Fleming's vexatious and harassing behavior. Moreover, Fleming has not demonstrated – nor is there – a change in circumstances warranting modification of the Order. *See Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (modification of an injunction may be proper "if the circumstances, whether of law or fact, . . . at the time of its issuance have changed, or new ones have since arisen"). Accordingly, the Court should deny Fleming's request that it modify its Order to permit Fleming to file unlimited Enron-related lawsuits without leave of court. Indeed, the reasons for the Court's injunction against Fleming continue to be as compelling today as they were at the time it was entered in February 2002.

As the Court recalls, prior to its entry of the Order, Fleming had engaged in a campaign of filing Enron-related state court lawsuits and seeking temporary restraining orders without notice and on matters previously decided by this Court. The Court, finding that Fleming's tactics were a disruption in its proceedings, properly entered its Order to stop these harassing practices. As the Fifth Circuit noted when Fleming appealed the Order, "[the] duality [of the federal/state courts] . . . offers no shelter to sharp practice from the enforcing arm of the state or federal courts. . . . The district court properly saw these moves in state court to be unjustified efforts to harass parties to the federal cases, . . . [and] the court has the power, indeed the duty, to remind

counsel that they are professionals and order their return to the playing field." *Newby v. Enron Corp.*, 302 F.3d 295, 303 (5th Cir. 2002), *cert. denied, Fleming & Assocs., L.L.P. v. Fastow*, 123 S. Ct. 1270 (2003). The Fifth Circuit further noted, "Fleming's actions constitute a sufficiently serious and systematic abuse of the courts to warrant the injunction." *Id.* Nothing has changed since the Fifth Circuit so ruled.

To the contrary, Fleming has continued to employ tactics designed to vex and confound the courts and defendants. Since the entry of the Order and its affirmance on appeal, the Fifth Circuit has upheld another Fleming-related order entered by this Court. In the *Bullock* case,[2] Fleming sought to avoid this Court's discovery stay by issuing extensive discovery in state court identical to what would eventually take place in *Newby*. Fleming also sought a state court hearing on a temporary injunction to freeze the assets of Defendants named in the state court – an injunction which previously had been denied by this Court. As a result, the Court entered another order against Fleming, this time enjoining discovery in *Bullock* until it ruled on the *Newby* motions to dismiss and enjoining Fleming from seeking injunctions in state court without leave of court. *See* Docket No. 577. Fleming appealed this order as well, but, once again, the Fifth Circuit upheld the Court's injunction, finding the Court "did not err in concluding that [Fleming's] requests for temporary injunctions in the state court in this case are an attempt to taunt the parties and the court and to undermine the district court's ability to control the consolidated litigation. . . ." *Newby v. Enron Corp.*, 338 F.3d 467, 475 (5th Cir. 2003). The Fifth Circuit identified Fleming's actions as a *continuance* of the behavior it had condemned in the previous appeal. *Id.*

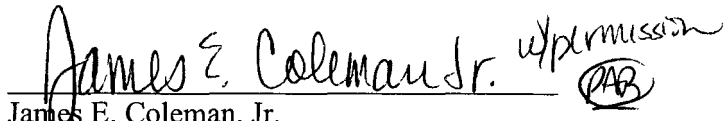
[2] Case Number 32716, *Jane Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, pending in the 21st Judicial District Court of Washington County, Texas.

In light of the above, Fleming's disingenuous statement that the Court should modify the Order because Fleming "realizes the tremendous burden this Court is laboring under to keep this litigation focused and organized," and it "does not want to further burden this Court with continual requests to file similar actions," (Motion at ¶ 6) rings hollow. As the Fifth Circuit observed in affirming the Order, this Court "has ruled on many motions and has been heavily engaged in the considerable task of managing this complex litigation . . ." *Newby*, 302 F.3d at 299. Fleming has not, by word or action, provided any reason for this Court to reconsider its injunction. Indeed, Fleming does not even bother to represent to this Court that it will not seek temporary restraining orders, temporary injunctions, or other actions that could disrupt the present proceeding. Instead of reducing this Court's workload, allowing Fleming unfettered discretion to file lawsuits in state courts may well increase it. The tactics that Fleming may employ in future-filed cases are only limited by the imaginations of the lawyers involved.

III. Conclusion

Wherefore, for the reasons stated herein, Respondents respectfully request that the Court deny that portion of Fleming & Associates, L.L.P.'s Motion which seeks to modify its Order.

Respectfully submitted,



James E. Coleman, Jr.
State Bar No. 0457400
Southern District ID No. 04574000
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3000
Facsimile: (214) 855-1333
Attorney In Charge For Defendant
Kenneth L. Lay

OF COUNSEL:
Diane M. Sumoski
State Bar No. 19511000
Southern District ID No. 14847
Bruce W. Collins
State Bar No. 04604700
Southern District ID No. 10451
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 855-3000
Facsimile: (214) 855-1333

John J. McKetta, III w/permission
State Bar No. 13711500
Federal ID No. 29895
GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
Telephone: (512) 480-5600
Facsimile: (512) 478-1976
Attorney In Charge For Defendant
Rebecca Mark-Jusbasche

OF COUNSEL:
Helen Currie Foster
State Bar No. 24008379
Federal ID No. 29894
Eric G. Behrens
State Bar No. 02070500
515 Congress Avenue, Suite 2300
P.O. Box 98
Austin, Texas 78767
Telephone: (512) 480-5600
Facsimile: (512) 478-1976

H. Bruce Golden w/permission
State Bar No. 08081500
Federal ID No. 8314
GOLDEN & OWENS LLP
1221 McKinney St., Suite 3600
Houston, TX 77010
Telephone: (713) 223-2600
Facsimile: (713) 223-5002
Attorneys For Defendant
John A. Urquhart

Jacks C. Nickens
State Bar No. 15013800
NICKENS, KEETON, LAWLESS, FARRELL
& FLACK, L.L.P.
600 Travis Street, Suite 7500
Houston, TX 77002
Telephone: (713) 571-9191
Facsimile: (713) 571-9652
Attorney In Charge For Richard B. Buy, Richard A. Causey, Mark A. Frevert, Kevin P. Hannon, Steven J. Kean, Mark E. Koenig, Jeffrey Mcmahon, Cindy K. Olson, Kenneth D. Rice, and Lawrence Greg Whalley

OF COUNSEL:

Paul D. Flack
State Bar No. 00786930
Joanna V. Hamrick
State Bar No. 03003200
NICKENS, KEETON, LAWLESS, FARRELL
& FLACK, L.L.P.
600 Travis Street, Suite 7500
Houston, TX 77002
Telephone: (713) 571-9191
Facsimile: (713) 571-9652

Roger E. Zuckerman
Steven M. Salky
Deborah J. Jeffrey
ZUCKERMAN SPAEDER LLP
1201 Connecticut Avenut, N.W.
Washington, D.C. 20036-2638
Telephone: (202) 778-1800
Facsimile: (202) 822-8106
Attorneys For Defendant Lou L. Pai

Jeffrey W. Kilduff
O'MELVENY & MYERS, LLP
1650 Tysons Blvd.
McLean, VA 22102
Telephone: (703) 287-2400
Facsimile: (703) 287-2404
Attorney In Charge For Defendant
Jeffrey K. Skilling

OF COUNSEL
Robert M. Stern
Bruce Hiler
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4001
Telephone: (202) 383-5300
Facsimile: (202) 383-5414

Ronald G. Woods
RONALD G. WOODS, ATTORNEY AT LAW
5300 Memorial, Suite 1000
Houston, TX 77007
Telephone: (713) 862-9600
Facsimile: (713) 864-8738

John Keker
John Keker w/permission
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, CA 94111
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Attorney in Charge for Defendant
Andrew Fastow

OF COUNSEL:
Craig Smyser
State Bar No. 18777575
Asim Bhansali
State Bar No. 90001290
SMYSER KAPLAN & VESELKA, L.L.P.
700 Louisiana, Suite 2300
Houston, TX 77002
Telephone: (713) 221-2300
Facsimile: (713) 221-2320

William F. Martson
William F. Martson, Jr., OSB No. 72163 w/permission
TONKON TORP, L.L.P.
888 S.W. Fifth Avenue, Suite 1600
Portland, OR 97204-2099
Telephone: (503) 221-1440
Facsimile: (503) 274-8779
Attorney in Charge for Defendant
Ken L. Harrison

OF COUNSEL:
Zachary W.L. Wright
OSB No. 94161
TONKON TORP, L.L.P.
888 S.W. Fifth Avenue, Suite 1600
Portland, OR 97204-2099
Telephone: (503) 221-1440
Facsimile: (503) 274-8779

Michael P. Cash
Texas Bar No. 03965500
Southern District ID No. 5472
CASH ALLEN L.L.P.
600 Travis, Suite 6710
Houston, TX 77002
Telephone: (713) 224-6767
Facsimile: (713) 227-6222

Glen M. Boudreaux
State Bar No. 02696500
Federal ID No: 4168
BOUDREAUX, LEONARD & HAMMOND, P.C.
909 Fannin, Suite 2350
Houston, TX 77010
Telephone: (713) 757-0000
Facsimile: (713) 757-0178
Attorney in Charge for Defendant
Stanley C. Horton

OF COUNSEL:
Tim S. Leonard
Maryellen S. Hester
BOUDREAUX, LEONARD & HAMMOND, P.C.
909 Fannin, Suite 2350
Houston, TX 77010
Telephone: (713) 757-0000
Facsimile: (713) 757-0178

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served on all counsel of record on the Service List on October 29, 2003 via posting to www.esl3624.com in compliance with the Court's Order Regarding Service of Papers and Notice of Hearing Via Independent Website.